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Supreme Court of the United States

October Term, 1959

No. 952 96

JOHN M. KOSSICK,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 23, 1960.

Questions Presented

1. Whether a state statute[1] is legally sufficient to bar an action for breach of a maritime contract, which but for such state statute, would constitute a valid and meritorious cause of action.

2. Whether the right to maintenance and cure, considered a maritime contract from the time when the "mind of man runneth not to the contrary," changes its nature when the shipowner substitutes in place of its obligation, a promise to pay money on land.

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[1] New York Personal Property Law, Section 31, commonly known as Statute of Frauds.

3. Is a shipowner's obligation to provide maintenance and cure terminated the instant a seaman enters a U. S. Marine Hospital for treatment?

4. Is the shipowner/employer or the United States Government or are both charged with legal responsibility for surgical malpractice, after a seaman enters a United States Public Health Service Hospital?

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated September 10, 1958 is reported at 166 F. Supp. 571.

The opinion of the Court of Appeals for the Second Circuit is reported at 275 F. 2d 500.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on February 23, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Reasons for Granting the Writ

1. There is a conflict of authority between the holding by the Court below, the United States Court of Appeals for the Second Circuit, and the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, by the United States Court of Appeals for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112.

2. A state statute (Statute of Frauds) has been erroneously construed.

3. The Court below has erroneously invoked state law, thereby superseding and destroying long established principles of maritime law.

4. The decision below constitutes a radical departure from the ancient and well established law controlling shipowners' maritime obligations, to provide their seamen with maintenance for their living expenses while sick or injured.

5. The decision of the Court below destroys freedom of action, as to a seaman retaining a doctor of his own choosing and at his own expense, at the risk of deprivation of his living expenses.

Statement

Petitioner, a seaman, employed by respondent in the capacity of chief steward, suffered a disability during the course of his employment, which required treatment.

Petitioner made arrangements for such treatment with his private physician as he had serious and well founded objection to being treated by the Public Health Service.

Respondent compelled petitioner to discharge his private doctor on the threat of refusing to give him his maintenance unless he did so, and agreed that it would be responsible for any ill effects resulting from petitioner's discharge of his doctor and accepting the services of the United States Public Health Service in his stead.

The factual situation is set forth in plaintiff's answer to defendant's interrogatory #5.

> "5. In the Fall of 1949, plaintiff became aware of an unusual degree of nervousness, tenseness and apprehension and tremors. In January of 1950, plaintiff noticed a lump in the region of his thyroid on the left side. Symptoms of nervousness and excitability, tenseness and apprehension continued to

become worse until August of 1950, at which time the plaintiff was discharged from the S.S. CAPE ANN and the plaintiff was offered a master's certificate to go to the United States Public Health Service Hospital in Staten Island.

Prior thereto in between trips of approximately 20 to 30 days, the plaintiff was receiving treatment for his thyroid condition by a private doctor—Dr. Frick, 445 West 23rd Street, Borough of Manhattan, City of New York. Plaintiff had contracted with Dr. Frick to perform the necessary operation and furnish all post-operative medical treatment for the flat price of $350. Said price to include the hospitalization.

Plaintiff asked the defendant through its Medical Department, Captain MacCumber and George Halstead, the port steward, to approve his receiving the medical and surgical treatment from Dr. Frick. The conferences were numerous and each time that this matter was taken up with the defendant through these parties, plaintiff was told that the maintenance as well as the cure would not be paid for by the defendant unless plaintiff went to the United States Public Health Service Hospital at Staten Island. Plaintiff repeatedly stated that he was willing to pay for his own medical treatment but that he did not wish to waive the maintenance because there was a probability that the convalescence following the operation might be extensive in point of time because of the symptoms which predated the operation, having continued for such a long period. Plaintiff stated that he did not wish to waive the maintenance under any circumstances even though he was willing to waive the cost of the said medical treatment. The defendant through all of those above mentioned persons represented to the plaintiff that if he waived his privilege of going to his own private doctor and instead went to the United States Public Health Service Hospital at Staten Island for his treatment and operation, the defendant would be responsible for everything that happened and would make good any bad consequences or damage resulting from said treatment, thereby wrongfully preventing plaintiff from his choice of doctors.

The plaintiff repeatedly stated to all of the heretofore mentioned agents of the defendant that he had already had some very unpleasant experiences at the United States Public Health Service Hospital which made him shudder at the thought of going back there and specifically related the two experiences he had in mind. The first experience was in the year 1937, when the plaintiff went there with a nasal cold and before the plaintiff knew it and before the plaintiff could possibly get out of the hospital, he found himself being operated on for a sinus condition, which he was not even aware of having had and since that time the plaintiff has had all sorts of trouble with his nose which he had never had before. To this day, the plaintiff is convinced that that was an unnecessary operation and there was nothing he could do about avoiding it. There was no one he could talk to and obtain any sort of satisfaction. In the same year, 1937, the plaintiff was sent to the same United States Public Health Service Hospital in Staten Island, having been referred there by the United States Public Health Service Hospital, Hudson and Jay Streets, where the plaintiff had received a most cursory examination by a specialist upon the complaint of the plaintiff that he was beginning to have tremors and nervousness. When this specialist touched his chest he immediately stated that the plaintiff had a thyroid condition which had to be corrected by surgery and immediately referred the plaintiff to the United States Public Health Service Hospital in Staten Island. Upon his arrival there, the plaintiff was confined to a room for one solid period of three weeks, during which time he was never examined by anyone, was unable to obtain any sort of information or consultation and during which time he was compelled to share a room with another person by the name of Frank Atwood, a postal worker, who was suffering from active tuberculosis and who died two months later from that disease at a United States Tuberculosis Hospital in New York City, to which he was transferred.

All of these conversations merely resulted in reaffirmance of the promises of the defendant through these agents, that that was the only place

that they would authorize treatment and that they guaranteed the results would be satisfactory and they would be responsible for any untoward or unexpected damages as feared. At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hospital but plaintiff became convinced that the defendants were making a separate contract to be responsible for anything that went astray as a result of plaintiff's treatment at the said hospital and in reliance on that representation, the plaintiff gave up his right to his own choice of doctors as an inducement to the defendant, so that the defendant would pay him maintenance. Plaintiff was fully aware that he had a right to maintenance, even though he chose his own doctor and hospital for treatment, and was aware that he would be waiving the cost of the cure and medical treatment. This he was willing to waive, but he was not willing to waive the maintenance which might be for an extended period of time, in view of the fact that the symptoms had lasted so long before the operation."

The United States Public Health Service, while treating appellant for a thyroid condition, gave him a rectal anesthesia with full strength medication, without diluting same as required, which medication resulted in destroying appellant's tissue. The tissue around the anus was destroyed so badly that he required a colostomy, first on December 22, 1950 on one side of his body, which became infected, requiring a second colostomy on January 26, 1951 on the other side of his body.

POINT I

There is a conflict of authority between the holding by the Court below, the United States Court of Appeals for the Second Circuit, and the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112.

The Court below overruled the decision in the case of *Union Fish Company* v. *Erickson, supra.*

The learned Court below, while it did "assume" that the holding in *Union Fish Company* v. *Erickson, supra,* was still the law, then by labelling the ancient maritime obligation as "not a maritime contract, since it was merely a promise to pay money on land * * *," in effect overruled said decision and destroyed the effect thereof.

The distinction drawn by the Court below has been unsuccessfully urged at prior times and always rejected.

Judge Leibell, in the case of *Northern Star S.S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, stated as follows at page 536:

> "(5-6) The fact that a contract is not in writing does not bar a suit thereon in admiralty. American Hawaiian S.S. Co. v. Willfuehr, D. C. Md. 1921, 274 F. 214, affirmed United States Fidelity & Guaranty Co. v. American-Hawaiian S.S. Co., 4 Cir., 1922, 280 F. 1023. A state Statute of Frauds is inapplicable to maritime contracts. In Union Fish Company v. Erickson, 248 U. S. 308, at page 314, 39 S. Ct. 112, 113, 63 L. Ed. 261, Mr. Justice Day stated the reason for the rule as follows: 'If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rule of the states'."

See also cases cited post under Point III.

POINT II

A state statute (statute of frauds) has been erroneously construed.

The shipowner was bound to provide adequate maintenance and cure.

Such obligation constitutes the shipowner the original obligor and not an indemnitor.

The right to maintenance is a contractual obligation between shipowner and seaman. It is a basic and integral element of the employment contract. *Farrell* v. *United States*, 336 U. S. 511, 69 S. Ct. 707; *Lindgren* v. *Shepard S.S. Co.*, 108 F. 2d 806.

The interpretation by the Court below is an erroneous interpretation of the law. The correct interpretation is to be found in the New York State Court decisions, such as *Bulkley* v. *Shaw*, 289 N. Y. 133, at pages 138, 139 (14a):

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.'"

This language recognizes the distinction in the legal obligation here, namely:

> (1) Is it one that the "promisor is bound to pay" in which event it is its own obligation and not within the statute?
>
> or
>
> (2) Is it one that the original debtor "still ought to pay" which renders the obligation not that of the promisor but one "to answer for the debt, default or miscarriage of another person"?

Fundamentally, a shipowner should not be permitted to escape its legal obligation to provide a seaman with maintenance and cure by other promises.

POINT III

The Court below has erroneously invoked State Law as superseding and destroying long established principles of maritime law.

THE NEW YORK STATUTE OF FRAUDS IS NOT A LEGAL DEFENSE IN ANY MARITIME ACTION ARISING OUT OF THE OBLIGATION OF A SHIPOWNER TO FURNISH MAINTENANCE AND CURE.

The law is elementary both in the New York and Federal Courts that it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law or affect rights thus created.

In *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 405-6:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. ed. 834), we must look to the decisions of the Federal Courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal Courts."

This rule was adopted in *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314.

In *Pope and Talbott Inc.* v. *Hawn*, 346 U. S. 406, 409-410, 74 S. Ct. 202, the Court stated:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court".

In *Frame* v. *City of New York*, 34 Fed. Supp. 194, defendant moved to dismiss the complaint claiming damages for personal injuries under the Jones Act and also for

maintenance and cure on the ground the plaintiff had failed to file with the City of New York the notice of accident and injury, and claim for damages as required by the laws of the State of New York. This motion was summarily rejected by District Judge Bondy and in the course of his opinion he stated: "The Statutory requirements relied upon by the defendant are also inconsistent with the uniform operation of the maritime law in so far as the action for maintenance and cure is concerned." "The local rules respecting municipal liability in tort may be overridden 'by the law of the sea'."

See:

Cox v. *Roth*, 248 U. S. 207, 75 S. Ct. 242.

POINT IV

The decision below constitutes a radical departure from the ancient and well established law controlling shipowners' maritime obligations to provide their seamen with maintenance for their living expenses while sick or injured.

The time proven effect of the obligation for maintenance and cure, is expressed by Judge Cardozo in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 173, in which case he defines the obligation of maintenance and cure as a maritime contractual obligation in the following language at page 174:

> "A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the

* *The Osceola*, 189 U. S. 158, 23 S. Ct. 483.

incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him; the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955."

Our Courts have consistently refused to accept excuses by shipowners for failure to provide living expenses and reasonable medical and surgical treatment, and have always held the shipowner liable for the consequences of such breach of their ancient maritime obligation to provide maintenance and cure.

Dictatorial powers have been granted shipowners to compel seamen to submit to surgical treatment at the hands of doctors, not of their choosing and in whom they have no confidence, and in effect to become guinea pigs for experimental and training purposes at marine hospitals over the protest of said injured seaman, at the threat of withholding payment of maintenance, even though the seaman chooses to forego free hospitalization and pay for it at his own expense.

This takes on a tone of slavery and should not be tolerated in the United States of America.

Mindful of the wonderful and humanitarian work accomplished by our United States Public Health Service Hospitals, nevertheless the dignity of man must be upheld and an American citizen should not be denied freedom of choice, particularly as to surgical treatment.

POINT V

The decision of the Court below destroys freedom of action, at seaman's own expense of retaining a doctor of his own choosing, at the risk of deprivation of his living expenses.

The decision of the Court below, in effect, destroys personal liberty and dignity of man, in that a shipowner is vested with dictatorial powers, by means of economic pressure, to coerce a seaman to submit to surgery at the hands of doctors in whom he has no confidence and whose work he fears, irrespective of the fact that the seaman undertakes to obtain a doctor at his own expense.

In the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, back in 1903, the Supreme Court held that an employer could not escape responsibility for any damage caused by inadequate treatment of an ill or injured seaman.

Certainly, the consequences of bad treatment is not assumed by the seaman. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

The duty to provide maintenance and cure finds its origin in ancient maritime law. It arises out of a personal indenture by which the seaman is bound to his ship and, in return, the vessel is bound to him in maintenance and cure. *Erlochasson* v. *Freeport Sulphur* (1925), 7 F. 2d 674.

See also:

Sims v. *United States of America War Shipping Adm'n*, 186 F. 2d 972;
Troy, D. C. W. D. N. Y. 1902, 121 F. 901.

The seaman is not in a position of equal bargaining with the shipowner.

It is, indeed, unrealistic to require a seaman in need of surgery or medication to negotiate and wait for a written commitment from his employer, particularly where his ailment requires prompt attention.

Nothing seems more unfair, unjust and unreasonable than to deny to a seaman the right to enforce his employer's promise on the basis that it was not made in writing.

The law is well settled that one exercising coercive and oppressive acts is responsible for the consequences thereof.

The shipowner unquestionably had the original obligation to provide maintenance and cure. It failed to do so and substituted in place thereof an oral contract. It breached its oral contract.

The Court below has ruled that the shipowner may not be held responsible for the breach of its contract because:

1. It was not in writing.

2. Its obligation to provide proper and adequate cure terminated when the seaman entered a Marine Hospital.

We submit that such holding is contrary to the humanitarian, fair and just action so clearly demonstrated by the Supreme Court in the case of *Bisso* v. *Inland Waterways Corporation*, 75 S. Ct. 629, 349 U. S. 85 as to what constitutes fair bargaining.

The shipowner used economic pressure as the means whereby it destroyed petitioner's freedom of choice as to a surgeon at petitioner's own expense, by refusing to give him maintenance for living expenses unless said seaman capitulated to the wishes of the shipowner, discharge Dr. Frick whom he had retained, and enter a Marine Hospital instead.

Conclusion

All seamen are vitally concerned as to whether or not their ancient maritime rights to maintenance and cure are subject to curtailment by state law and/or judicial decision, destructive of and a radical departure from, ancient and well established principles of admiralty law.

By reason of the foregoing, petitioner prays on behalf of himself and all seamen having need of the protection of our Courts, that this Honorable Court take under advisement the questions herein presented by granting the petition for a writ of certiorari.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

Before:

MAGRUDER, MEDINA and FRIENDLY,
Circuit Judges.

MAGRUDER, *Circuit Judge*:

Appeal is here taken from an order of the United States District Court for the Southern District of New York dismissing an amended complaint which appellant filed against United Fruit Company. 166 F. Supp. 571. It was alleged that appellant was working as chief steward on a vessel belonging to the United Fruit Co.; that while so working he suffered an illness which was not claimed to be attributable to any negligence or breach of duty by the defendant; that the shipowner had a maritime obligation to supply the seaman with "maintenance and cure"; that appellant had engaged the services of a private physician to treat his illness, but that the shipowner wanted the seaman to be treated free of charge at a United States Public Health Service Hospital at Staten Island, New York; that United Fruit Co. agreed, on or before August 28, 1950, that if the seaman would discharge his private physician and become a patient at such United States Public Health Service Hospital, "defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; that in reliance upon such agreement by the shipowner appellant did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on August 28, 1960; that on

the same day he suffered injuries by being chemically burned about the rectum when a strong colonic was negligently administered by personnel employed by the hospital; that by reason of the foregoing the plaintiff became totally and permanently disabled and suffered damages in the amount of $250,000, for which judgment against defendant was prayed.

[1] As the district judge observed, these allegations were bottomed "on contract and not on unseaworthiness or the Jones Act"; that this was not an oversight by the plaintiff "but rather a stratagem to resuscitate a claim time barred under the Jones Act." 166 F. Supp. at page 573.

The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law, § 31, subd. 2 that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement "[i]s a special promise to answer for the debt, default or miscarriage of another person."

[2, 3] Great reliance is placed by appellant upon the decision in Union Fish Co. v. Erickson, 1919, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, to the effect that a maritime contract cannot be nullified in an admiralty court by a State Statute of Frauds. We shall assume that Union Fish Co. v. Erickson is still the applicable law and that the decision therein has not been modified by subsequent decisions. Nevertheless it is obvious that it applies only to "maritime contracts." The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment. See Pacific Surety Co. v. Leatham & Smith Co., 7 Cir., 1907, 151 F. 440; Clinton v. International Organization of Masters, 9 Cir., 1958, 254 F. 2d 370. For all that appears in the complaint, it

may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff had been terminated. It really makes no difference whether this is so or not. All that remained was the performance by the shipowner of its undisputed obligation to supply maintenance and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. See The Bouker No. 2, 2 Cir., 1917, 241 F. 831, 835, certiorari denied sub nom. Jones v. Bouker Contracting Co., 1917, 245 U. S. 647, 38 S. Ct. 9, 62 L. Ed. 529. That took care of the obligation to furnish "cure." As to the obligation to furnish maintenance, it is true that the amended complaint also contained a second count alleging that defendant failed and refused to supply plaintiff with the expenses of his maintenance and cure. But in the order appealed from, this second cause of action was discontinued "without prejudice and without costs to either party"; and appellant makes no objection to this action by the trial judge.

A judgment will be entered affirming the order of the District Court.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February, one thousand nine hundred and sixty.

Present:

HON. CALVERT MAGRUDER,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOHN M. KOSSICK,
Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.